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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/663,310	09/16/2003	Mau-Song Chou	NGC-00088 (339-804)	1341

64728 7590 04/30/2008

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EXAMINER	
TANINGCO, MARCUS H	

ART UNIT	PAPER NUMBER
2884	

MAIL DATE	DELIVERY MODE
04/30/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MAU-SONG CHOU,
LARRY YUJIRI, and
DAVID P. DIXON

Appeal 2008-1578
Application 10/663,310
Technology Center 2800

Decided: April 30, 2008

Before CATHERINE Q. TIMM, ROMULO H. DELMENDO, and JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

ORDER REMANDING TO THE EXAMINER

This appeal was taken pursuant to 35 U.S.C. § 134 from the final rejection of claims 1-65.

Our review of the application leads us to conclude that this appeal is not in condition for a decision at this time. Therefore, we remand the

application to the Examiner to consider the following issues and to take appropriate action.

The Examiner in the Answer, page 4, contends that Luukanen's

> system can be used in a variety of applications including sub[-]millimeter range spectroscopy, but he fails to specifically disclose that an emission spectrum is generated from the sample from which the chemical and biological materials present in the sample are detected. However, since spectroscopy inherently means generation of spectrum of radiation from the sample, and since the Luukanen system works in the passive mode, it would have been obvious that by stating that sub[-]millimeter spectroscopy applications are possible to mean passive emissions spectra generation as disclosed by Laufer.

In response to the Examiner's Answer, Appellants filed a Reply Brief on December 18, 2006. Appellants argue that Luukanen specifically states that their sub-millimeter wavelength system is an imaging system. In support of this position, Appellants' state:

> To support Appellant's position that sub-millimeter wave radiation can be used for imaging, Appellant hereby provides the chapter on Terahertz Imaging from Mittleman, D., "Sensing with Terahertz Radiation". Appellant submits that sub-millimeter waves are in the terahertz frequency range. Section 3 in the Terahertz Imaging chapter of this book specifically states [that], "numerous examples of sub-millimeter and millimeter-wave imaging can be found in the literature." Appellant submits that when Luukanen refers to sub-millimeter spectroscopy, he is only referring to sub-millimeter spectroscopy for imaging purposes. (Reply Br. 2-3).

The Examiner noted that the Reply Brief had been entered and considered and forwarded the application to the Board. *See* Paper mailed October 4, 2007. Our review of the record reveals that the Examiner has not

indicated whether the evidence (Terahertz Imaging from Mittleman, D., "Sensing with Terahertz Radiation")[1] relied upon by Appellants in the Reply Brief for rebuttal to the Examiner's rejection of the claims was entered or not.

Current patent practice and procedure indicates that the Reply Brief should not include any new or non-admitted or evidence. The Examiner's indication that the Reply Brief has been entered does not indicate the status of the additional evidence. 37 C.F.R. § 41.41 states:

> (a)(1) Appellant may file a reply brief to an examiner's answer within two months from the date of the examiner's answer.
>
> (2) A reply brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other evidence. See § 1.116 of this title for amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.33 for amendments, affidavits or other evidence filed after the date of filing the appeal.
>
> (b) A reply brief that is not in compliance with paragraph (a) of this section will not be considered. Appellant will be notified if a reply brief is not in compliance with paragraph (a) of this section.

The present record is unclear as to whether the Examiner has in-fact considered the additional evidence referenced by Appellants in the Reply Brief. The Examiner should clarify the present record by indicating (1)

[1] A copy of the document was not attached to the Reply Brief filed December 18, 2006. However, the document was supplied with the Reply Brief filed May 18, 2006. In response to this Reply Brief (Paper mailed June 22, 2006) the Examiner only indicated "[t]he Reply Brief filed on 05/18/2006 has been noted."

whether or not the Reply Brief is in compliance with 37 C.F.R. § 41.41; (2) whether or not additional evidence submitted with the Reply Brief has been entered and considered; (3) if the evidence has been entered, if appropriate, provide a statement addressing the sufficiency of the evidence; and (4) if it is determined that the Reply Brief is not in compliance with 37 C.F.R. § 41.41, appropriately notify the Appellants.

Accordingly, we remand the application to the Examiner to consider the above issues and to take action not inconsistent with the views expressed herein.

This remand to the Examiner pursuant to 37 C.F.R. § 41.50(a)(1) is made for further consideration of a rejection. Accordingly, 37 C.F.R. § 41.50(a)(2) applies if a Supplemental Examiner's Answer is written in response to this remand by the Board.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

REMANDED

tf/ls

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